No. 14-16084
In the

United States Court of Appeals for the Ninth Circuit

In re Apple iPhone/iPod Warranty Litigation

Charlene Gallion, *et al.*,
Plaintiffs-Appellees,
v.
Michael Casey,
Objector-Appellant,
v.
Apple, Inc.
Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of California
Hon. Richard Seeborg
Case No. 10-cv-01610-RS

PLAINTIFFS' MOTION TO DISMISS AND FOR SANCTIONS AND INCORPORATED MEMORANDUM OF LAW

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I. INTRODUCTION

Objector-Appellant Michael Casey filed this appeal from the District Court's judgment approving a $53 million class action settlement that, as the District Court has noted, is "markedly favorable to the Class[,]" Ex. 2 at 5:13, and for good reason: Even after the award of attorneys' fees are accounted for, approximately 165,000 Settlement Class Members will receive an average payment of $241, which represents a ***net recovery of 117% of the average replacement cost of their iPhone or iPod touch devices***, *id.* at 5:19-25, 9:4-19.[1]

Plaintiffs-Appellees ("Plaintiffs") hereby move to dismiss Mr. Casey's appeal because he is not a member of the Settlement Class. Mr. Casey was given ample opportunity to submit evidence establishing his membership in the Settlement Class (and, indeed, was ordered to do so), but he refused. He cannot change the record now, nor can he change the fact that he has flagrantly defied orders in the court below, and has proceeded with this appeal despite the District Court's explicit finding that he lacks Article III standing.

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[1] Pertinent excerpts of the record below are attached as Exhibits hereto. All references to "Ex." are to the Exhibits appended to this motion. Unless otherwise noted, capitalized terms have the meaning ascribed to them in by the Settlement Agreement. *See* Ex. 1 at 1-6 ¶ 1(A)-(VV).

The settlement includes *only* "Settlement Class Members," defined as owners of Apple iPhones and iPod touch devices ("Class Devices") whose warranty claim for "repair or replacement of [a] tendered Class Device was denied by Apple on the basis of Apple's Former Liquid Damage Policy." Ex. 1 at 5 ¶ 1(JJ). Mr. Casey submitted a claim form to the Settlement Administrator stating that Apple had refused to repair or replace his iPod touch under warranty in March 2009, but as the unrefuted evidence makes clear, that is simply not true. In short, Apple's records demonstrate that Mr. Casey's wife presented his iPod touch to Apple on March 31, 2009, and that ***Apple replaced the iPod touch free of charge under warranty the following day on April 1, 2009***. *See* Ex. 3 ¶ 3 & Exhibits B-C thereto. Mr. Casey has never disputed this fact or submitted any contrary evidence.

Nonetheless, upon receiving this evidence from Apple, Plaintiffs served Mr. Casey with a deposition and document subpoena. *See* Ex. 4 at 12-19. After initially indicating he would produce documents and appear for a deposition, Mr. Casey subsequently refused to do so, then refused to respond to Class Counsel's communications. Ex. 4 at 2-4 (¶¶ 8-17), 20-71. Plaintiffs moved to compel Mr. Casey's compliance with the subpoena, and Magistrate Judge Donna M. Ryu ordered Mr. Casey to appear for deposition near his home in Wisconsin and to produce documents pertaining to his objection and to his purported status as a Settlement Class Member at the deposition. *See* Ex. 5.

Mr. Casey ignored the Magistrate's order, declined to respond to Class Counsel's communications, and failed to produce any documents or appear for his duly-noticed deposition. *See* Ex. 4 at 4-6 (¶¶ 19, 22-24, 27-29), 72-74, 76-85, 91-114. He also failed to present any contrary evidence to the District Court, failed to respond to the arguments regarding his lack of standing in connection with the motion briefing on final approval of the Settlement Agreement, and failed to appear at the final-approval hearing. Accordingly, the District Court found that Mr. Casey "was given ample opportunity to rebut the parties' evidence and attempt to establish his status as a Settlement Class Member, but he declined to do so." Ex. 2 at 21:10-12. Thus, the record is crystal clear: Mr. Casey is not a Settlement Class Member, never had standing to object, and has no standing to appeal; nor can he submit new evidence or arguments on appeal to concoct standing.[2]

This appeal is ripe for dismissal, and Mr. Casey's conduct in filing a notice of appeal warrants sanctions. The record shows that Mr. Casey is acutely aware that

[2] Because Mr. Casey is not a Settlement Class Member, he is not entitled to any benefits under the Settlement Agreement, *see* Ex. 1 ¶ 1(FF); nor does the Settlement Agreement operate to release any claims he might otherwise have against Apple, *see id.* ¶ 1(JJ).

he has no standing to appeal, but he filed an appeal anyway. There are no other appeals, and the time to file a notice of appeal has expired. As a result, Mr. Casey's frivolous appeal is the only thing preventing approximately 165,000 ***actual*** Settlement Class Members from receiving payments from the $53 million Settlement Fund.

The peculiar circumstances underlying Mr. Casey's objection—such as the filing of a false claim, the text of the objection itself, and the fact that the envelopes in which he submitted his objection and his notice of appeal bear San Diego County postmarks notwithstanding that Mr. Casey lives in Wisconsin—suggest that Mr. Casey's actions are being orchestrated by an attorney who is a well-known serial objector to class-action settlements who wishes to avoid being identified with this litigation. That is another indication of the bad faith motivating this appeal.

Put simply, Mr. Casey's lack of standing precludes him from proceeding with this appeal, and his brazen disregard for the judicial process has demonstrated that Mr. Casey needs something more than being told "No" to make him stop trying to delay the payment of Settlement benefits to Settlement Class Members. Accordingly, Plaintiffs respectfully request that this Court dismiss this appeal and award sanctions against Mr. Casey in an amount sufficient to compensate Class Counsel for having to prepare and file this motion.

II. RELEVANT BACKGROUND

A. The Settlement Agreement

Plaintiffs brought this class action on behalf of the owners of iPhone and iPod touch devices ("Class Devices") who were denied free repair or replacement of their Class Devices pursuant to Apple's "Former Liquid Damage Policy," under which Apple denied warranty coverage whenever a Liquid Submersion Indicator ("LSI") located in the headphone jack and/or docking connector of the device had turned pink or red, regardless of the symptoms or cause of the malfunction that led to the warranty claim. *See* Ex. 2 at 15:1-14.

Plaintiffs alleged that LSIs are not capable of determining whether a device has actually been exposed to liquid, let alone whether it has been damaged by liquid, and that Apple used them as a pretext to deny valid warranty claims. *See id.* After extensive discovery and mediation, the parties reached a settlement in which Apple agreed to pay $53 million in cash into a non-reversionary Settlement Fund, in addition to bearing all costs of notice to the Settlement Class and the administration of the settlement. Ex. 1 at 5 ¶ 1(LL)), 5 (¶ 21). The Settlement Class is limited to owners of Class Devices who were denied a "repair or replacement [of their Class Device] . . . on the basis of Apple's Former Liquid Damage Policy" during the Relevant Time Period. Ex. 2 at 15:1-14.

Approximately 137,000 Settlement Class Members are "Direct Payment Settlement Class Members," meaning they will be mailed a check without having been required to submit a claim (or do anything at all) because Apple's records contained sufficient information to qualify them for payment. *See* Ex. 6 at 3 (¶ 7). To locate Settlement Class Members for whom Apple's records did not contain sufficient information to mail automatic payments, approximately 6.5 million email notices were sent to anyone who had a service appointment with Apple for a Class Device during the Relevant Time Period, regardless of whether their appointment in any way involved Apple's Former Liquid Damage Policy. *See* Ex. 1 at 14 (¶ 27), 18 (¶ 35); Ex. 7 ¶¶ 12, 19-21. In addition, notice was published in two major industry publications. *See* Ex. 2 at 20:3-6. Approximately 28,000 "Claims Made" Settlement Class Members have submitted claims eligible for payment. Ex. 6 ¶ 7.

In total, once this Settlement becomes final, approximately 165,000 Settlement Class Members will be mailed checks averaging $241, which amounts to ***117%*** of the average cost of replacing a Class Device. *See* Ex. 2 at 9:4-23.

B. MR. CASEY IS NOT A MEMBER OF THE SETTLEMENT CLASS

Mr. Casey filed both a claim for reimbursement under the terms of the Settlement Agreement and an objection to the Settlement. *See generally* Ex. 8. The District Court found that Mr. Casey's objection was facially deficient because his objection failed to provide the information required by the Conditional Approval Order to establish his membership in the Settlement Class; namely, (a) the type of Class Device that was the subject of the reimbursement claim, (b) the approximate date and location of the Apple Store at which coverage was allegedly denied, and (c) the serial number of the Class Device or, alternatively, the claimant's Apple ID. Ex. 2 at 21:4-22:18. Mr. Casey's objection stated that he had provided this information to the Court by including a copy of his claim form with his objection, but Mr. Casey did not include his claim form with his objection. *Id.*; *see also* Ex. 8 (Casey Objection). Consequently, Mr. Casey failed to comply with this most basic requirement of the Conditional Approval Order. Ex. 2 at 21:13-21.

The Settlement Administrator was, however, able to retrieve Mr. Casey's online claim form data from its records. In it, Mr. Casey claimed that in March 2009 he sought repair under warranty for a an iPod touch bearing serial number 9C822T4U14N, but that Apple denied his warranty claim. *See* Ex. 9 ¶ 5; *see also* Ex. 4 at 2 (¶ 4), 10.

Apple service records prove, however, that Apple did ***not*** deny Mr. Casey's warranty claim. To the contrary, those records show that Apple replaced his iPod touch device free of charge under the terms of Apple's warranty. *See* Ex. 3 at 2 (¶

3), 6-10. Because Mr. Casey was not denied repair or replacement pursuant to Apple's Former Liquid Damage Policy, he is not a Settlement Class Member.

C. MR. CASEY REFUSED TO PROVIDE EVIDENCE SUPPORTING HIS CLAIM AND THEN DEFIED A DISCOVERY ORDER.

Upon learning that Apple had honored Mr. Casey's warranty claim and had provided him with a free replacement for his iPod touch, Plaintiffs served a subpoena *duces tecum* requiring Mr. Casey to appear for deposition and to produce documents pertaining to his objection and his contention that he is a Settlement Class Member. *See* Ex. 4 at 2 (¶ 6), 12-16. Mr. Casey did not object to the subpoena and, initially, he agreed via email to appear for the deposition. *Id.* at 3 (¶ 10). But when Class Counsel attempted to schedule that deposition for a mutually-convenient date and time, Mr. Casey ceased communicating with them, *id.* at 2-4 (¶ 8-17), 20-68. Accordingly, Plaintiffs filed a motion to compel Mr. Casey to comply with the subpoena, which was referred to Magistrate Judge Ryu. *See generally* Discovery Letter Brief (Dkt. No. 123).

Mr. Casey failed to respond to the motion to compel and failed to appear at the hearing conducted on January 13, 2014. *See* Ex. 5 at 3 (discussing same). At the conclusion of the hearing, Magistrate Judge Ryu ordered Mr. Casey to appear for a deposition in Wisconsin and to produce a discrete set of documents relevant to his objection, including his purported standing. *Id.*

Mr. Casey sent an untimely letter to Magistrate Judge Ryu. *See* Ex. 10. The letter—which Mr. Casey admitted was ghostwritten in part by an unnamed attorney, *see id.* at 4—contained objections to the subpoena, but did not contain ***any*** evidence establishing his membership in the Settlement Class. *See generally id.*[3]

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[3] For several reasons, Class Counsel believe that Mr. Casey's actions are being orchestrated by professional objector Darrell Palmer or one of his colleagues. That evidence includes the following:

(1) Mr. Casey lives in Wisconsin, but the postmarks on the envelopes used to mail his objection and notice of appeal reflect that they were mailed from Vista, CA and San Diego, CA, where Mr. Palmer maintains a residence and his office respectively. It is doubtful Mr. Casey traveled from Wisconsin to California to mail two documents six months apart. *See* Ex. 4 at 2 (¶ 5), 112-113; Ex. 8 (Casey Objection); Ex. 11 (copy of envelope containing Notice of Appeal bearing postmark with San Diego zip code (92008));

(2) Mr. Palmer represented an objector named "Michael Casey" in *Fogel v. Farmers Group, Inc.*, Los Angeles County Superior Court, Case No. BC300142, who Class Counsel believe is the same Michael Casey. *See* Ex. 4 at 6 (¶ 30), 112-113;

(3) Mr. Casey's objection contains tell-tale language that Palmer has used in other objections, namely, his attempt to "incorporate by reference" objections filed by other objectors. *Compare* Ex. 8 at 2 *with* Ex. 4 at 113:21-22.

(4) Mr. Casey admits he has had the "assistance of counsel" drafting his papers. *See* Ex. 10 at 4;

(5) Mr. Palmer has attempted to appear through an ostensible *pro per* objector previously in *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-CV-01819-CW(N.D. Cal., Sept.23, 2011); and

(6) These facts were submitted to the District Court, and Mr. Casey did not dispute them. *See generally* Plaintiffs' Response to Objection (Dkt. No. 141).

Mr. Palmer has previously been suspended from the practice of law, is currently the subject of yet another disciplinary proceeding before the California Supreme Court

(Footnote continues on next page.)

In the same letter, Mr. Casey characterized Class Counsel's efforts to protect the integrity of this settlement as a "blood feud." *Id.* at 4. ("This letter was prepared with the assistance of counsel. I am in the process of looking for someone to represent me in Wisconsin and California as Class Counsel has now turned a simple objection into a blood feud"). And although Mr. Casey had time to consult an attorney and send a four-page, single-spaced letter, he contended that he was unable to appear before the Court—even by telephone. *Id.* ("Because of my work schedule I am not available for a telephone conference [with the court]").

After receiving Mr. Casey's untimely letter, Magistrate Judge Ryu declined to reconsider her order compelling him to comply with discovery. *See* Ex. 12. Shortly thereafter, Class Counsel made several attempts to contact Mr. Casey in an effort to schedule a deposition at a mutually agreeable time, but Mr. Casey refused to respond. *See* Ex. 4 at 5-6 (¶¶ 22-24, 27, 74-84, 91-94). To allow Mr. Casey as

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(case no. 12-O-16924), and has been sanctioned and criticized by multiple courts for filing frivolous objections and related misconduct. *See, e.g., In re Uponor, Inc.*, No. 11-MD-2247, 2012 U.S. Dist. LEXIS 130140, at *8-9 (D. Minn. Sept. 11, 2012) (observing that Mr. Palmer "is believed to be a serial objector to other class-action settlement[s]" and that "the Palmer Objectors have evidenced bad faith and vexatious conduct"). While there is no shortage of reasons to dismiss this appeal and sanction Mr. Casey, regardless of who is ultimately behind his appeal, the evidence set forth above also underscores the vexatious, bad-faith nature of Mr. Casey's conduct and this appeal.

much time as possible to prepare, Class Counsel noticed the deposition to take place near his home on the last possible business day permitted by Magistrate Judge Ryu's Order and provided notice of the date, time and location. *See id.* at 5 (¶ 23). Class Counsel also provided Mr. Casey with the Apple records demonstrating that Apple had provided him with a free replacement in response to the warranty claim for his iPod touch and, therefore, is not a Settlement Class Member. *See id.* at 82-84.

On the date set forth in the deposition notice, Class Counsel traveled to Wisconsin to depose Mr. Casey, but he did not appear or produce any documents. *See id.* at 91-110. Thereafter, Mr. Casey made no attempt to rebut Apple's records or otherwise support his contention that he is a Settlement Class Member.[4]

In granting the motion for final approval of the Settlement Agreement and overruling Mr. Casey's objection, Judge Seeborg specifically found that

> the parties have supplied the Court with evidence that the Class Device for which Mr. Casey filed a claim was replaced by Apple for free under warranty, *see* O'Neil Declaration (Dkt. No. 139); Mr. Casey is therefore not a Settlement Class Member because he was not denied warranty coverage pursuant to Apple's Former Liquid Damage Policy, and does not have standing to object to the Settlement Agreement. ***Mr. Casey was given ample opportunity to rebut the parties' evidence and***

[4] Plaintiffs provided the District Court with a detailed account of Mr. Casey's conduct in connection with the objections he submitted. *See* Plaintiffs' Response to Objection at 11-15 (Dkt. No. 141).

> ***attempt to establish his status as a Settlement Class Member, but he declined to do so.***

Ex. 2 at 21:4-12 (emphasis added).[5]

III. ARGUMENT

A. THE APPEAL SHOULD BE DISMISSED FOR LACK OF STANDING

It is axiomatic that only class members have standing to object to a settlement. *See*, e.g., FED. R. CIV. P. 23(e)(5) ("Any class member may object to the [proposed settlement]"); *In re Hydroxycut Mktg. & Sales Practices Litig.,* No. 09-1088, 2013 U.S. Dist. LEXIS 133413, *61 (S.D. Cal. Sept. 17, 2013) ("non-class members have no standing to object" to a class action settlement) (quotations omitted); *Moore v. Verizon Communs., Inc.*, No. 09-1823, 2013 U.S. Dist. LEXIS 122901, *33 (N.D. Cal. Aug. 28, 2013) ("It is well-settled that only class members may object to a class action settlement."); *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) (same).

Because the ***only*** evidence in the record demonstrates that Apple honored his warranty claim, and because Mr. Casey has failed to provide ***any*** evidence to the contrary, he is not a Settlement Class Member and, therefore, lacked standing to object to the Settlement Agreement. *See Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) ("We hold, therefore, that non-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement"); *Snell v. Allianz Life Ins. Co. of No. Am.*, 327 F.3d 665, 670 (8th Cir. 2003) ("Wolinsky is not a member of the class and she has no interest in the settlement").

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[5] The District Court also found that Mr. Casey's objections "consist solely of conclusory boilerplate statements that are devoid of authority or explanation." Ex. 2 at 21 (¶ 11(d)).

This Court's recent decision in *Glasser v. Volkswagen of Am., Inc.,* 645 F.3d 1084 (9th Cir. 2011), is instructive. In dismissing an appeal filed by an objector to a class-action settlement, the Court explained that "[t]o establish Article III standing on appeal, 'an appellant must establish that she has suffered an injury, caused by the appellee, that is redressable.'" *Id.* at 1088 (citing *Lobatz v. U.S. W. Cellular of Cal., Inc.,* 222 F.3d 1142, 1146 (9th Cir. 2000)). The Court found that the objector there had not met this standard because his appeal "cannot result in redressing any injury" to him. *Id.* (citing *Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1126 (9th Cir. 2002)). The same is true here. Again, Mr. Casey suffered no injury, much less one that is redressable, because Apple honored Mr. Casey's warranty by replacing his iPod touch for free.

This Court's ruling in *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29 (9th Cir. 1994), also illustrates why Mr. Casey's appeal should be dismissed for lack of Article III standing. *First Capital* involved an appeal filed by an individual who, ***unlike Mr. Casey***, "technically qualified" as a member of the settlement class. *Id.* at 29-30. Like Mr. Casey, however, that objector had already been made whole by the defendant. *Id.* Consequently, the Court found that the objector suffered "no injury 'likely to be redressed by a favorable decision.'" *Id.* (quoting *Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). "Simply being a member of a class is not enough to establish standing. One must be an ***aggrieved*** class member." *Id.* at 30 (emphasis added). Mr. Casey is neither.

Moreover, it is too late for Mr. Casey to try to rebut the undisputed evidence because Mr. Casey cannot introduce new facts on appeal that are not in the record below. *See, e.g., Lowry v. Barnhart*, 329 F.3d 1019, 1024, 1025-1026 (9th Cir. 2003) (refusing to allow new evidence on appeal, noting that the appellate court's limitation to the record submitted in the district court "is fundamental," and sanctioning the submitting party because "merely striking appellees' supplemental excerpts seems insufficient to deter abuse"); *United States v. Waters*, 627 F.3d 345, 355 n.3 (9th Cir. 2010) ("Facts not presented to the district court are not part of the record on appeal") (internal quotations omitted).[6]

Settlement Class Members should not be forced to wait to receive the substantial benefits created for them as a result of the Settlement Agreement while Mr. Casey wastes time and judicial resources pursuing an appeal that he has no standing to bring in the first place. As other courts have observed, "'there are public policy reasons to prevent frivolous objectors from threatening to hold up class distributions.'" *Gemelas v. Dannon Co.*, No. 08-cv-236, 2010 U.S. Dist. LEXIS 99503, *7-8 (N.D. Ohio Aug. 31, 2010) (quoting *In re Pharm. Inc.*, 520 F. Supp. 2d 274, 279 (D. Mass. 2007)); *see also Cardizem*, 391 F.3d at 818 (observing that "pursuit of [the] objections has the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds"); *Feder v. Elec. Data Sys. Corp.*, 248 Fed. Appx. 579, 581 (5th Cir. 2007) ("Urbanik, as the party seeking to establish jurisdiction, bears the burden of proving standing. . . . Because Urbanik lacked standing to object to the settlement, he cannot now appeal the district court's ruling on his objection"). Plaintiffs thus respectfully request that the Court dismiss Mr. Casey's appeal as soon as is practicable.

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[6] Mr. Casey's defiance of Magistrate Judge Ryu's discovery order also supports both aspects of this motion: dismissal of his appeal and the imposition of sanctions. Mr. Casey cannot willfully ignore a valid order pertaining to a subject that goes to the very core of his right to proceed—standing—and then seek to be heard on it in the first instance on appeal. *Cf. In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 818 (6th Cir. 2004) ("A litigant cannot ignore an order setting an appeal bond without consequences to her appeal").

B. Mr. Casey Should be Sanctioned

This is not a case in which a *pro se* objector made a good-faith mistake. Nor is this a case in which an objector was unfairly prevented from rebutting the evidence presented against him. Mr. Casey was provided multiple opportunities to submit such evidence, but he refused each one, flagrantly defying a court order and the judicial process as he did so. In addition to failing to appear at the hearing of Plaintiffs' motion to compel his compliance with the deposition subpoena and bizarrely characterizing the matter as a "blood feud," Mr. Casey purposefully caused Class Counsel to waste time and money by forcing counsel to travel to Wisconsin to depose him without letting counsel know he had no intention of complying with Magistrate Judge Ryu's order to appear; causing Class Counsel to expend more time, money, and effort on opposing his objection; and now blithely filing a notice of appeal despite the District Court's explicit findings that he lacks standing and its decision to overrule his objections in their entirety. *See* Ex. 2 at 16:17-17:5, 21:4-22:19; Ex. 4 at 5-6 (¶¶ 23-29), 79-84, 91-110.[7]

This Court has broad authority to sanction Mr. Casey for his misconduct in pursuing this appeal. In addition to the Court's inherent authority to impose sanctions (*see* 28 U.S.C. § 1927; Fed. R. App. P. 28; *Ransmeier v. Mariani*, 718 F.3d 64, 68 (2d Cir. 2013) ("Our authority to impose sanctions is grounded, first and foremost, in our inherent power to control the proceedings that take place before this Court") (citing *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43-44 (1991)), Federal Rule of Appellate Procedure 38 provides that

> [i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

[7] Mr. Casey's conduct below demonstrates the frivolity of this appeal and is relevant to issue of whether sanctions are warranted on appeal for having put counsel and the Court to needless trouble and expense. *See e.g., Wood v. McEwen*, 644 F. 2d 797, 802 (9th Cir. 1981) (considering *pro se* appellant's failure to comply with discovery orders and other conduct before District Court relevant in awarding sanctions under Fed. R. App. P. 38). Nonetheless, Plaintiffs do ***not*** seek to recover the fees and costs Class Counsel were forced to expend in connection with Mr. Casey's conduct in the District Court via the present motion. Rather, they seek the actual amount of fees and costs incurred to prepare and file the motion itself, and will submit evidence of the total amount after the Court rules on that aspect of this motion.

Thus, sanctions are proper "(1) when the appeal was wholly without merit or the result was obvious, and (2) when the appeal was not only frivolous but also taken in bad faith for purposes of delay or harassment." *In re Transcontinental Energy Corp.*, 764 F.2d 1296, 1300 (9th Cir. 1985) (citing *Oliver v. Mercy Medical Center, Inc.*, 695 F.2d 379, 382 (9th Cir. 1982)). This appeal satisfies both criteria.

Sanctions are also warranted under Section 1912, which provides that if the court of appeals affirms the judgment, it, "in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." 28 U.S.C. § 1912; *see also Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 944 (6th Cir. 2013) (Courts of Appeal have discretion to sanction under Section 1927).

Mr. Casey should be sanctioned personally, as he states on his notice of appeal he is proceeding "*pro se*." *See*, *e.g.*, *Wages v. IRS*, 915 F.2d 1230, 1235-36 (9th Cir. 1990) (applying sanction provisions of 28 U.S.C. § 1927 to *pro se* litigants); *Wood*, 644 F.2d at 802 (same). If it is determined that an attorney orchestrated Mr. Casey's objection and appeal, that attorney should be sanctioned as well. *See Walker v. Pac. Mar. Assoc.*, C07-3100 BZ, 2008 U.S. Dist. LEXIS 120026, *4-5 & n.2 (N.D. Cal. Apr. 14, 2008) (stating that the plaintiff "is warned that the court does not approve of this 'ghost-writing' practice. Ghost-writing frustrates the application of Federal Rule of Civil Procedure 11 which requires all attorneys to verify through their signatures that there are sufficient grounds for the arguments in their pleadings").[8] The amount of the sanctions should be determined in the first instance by the district court, *Pepperling v. Risley*, 739 F2d 443, 444 (9th Cir. 1984), or an Appellate Commissioner, *Aloe Vera of Am., Inc. v. U.S.,* 376 F. 3d 960, 966 (9th Cir. 2004).

IV. CONCLUSION

No actual Settlement Class Member has appealed the final approval of this exceptional settlement or the award of fees. Mr. Casey's appeal is frivolous and warrants swift action from this Court to prevent the unnecessary expenditure of judicial resources and to allow the Settlement Administrator to begin sending checks to approximately 165,000 actual Settlement Class Members. Accordingly,

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[8] *See also Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 961 (9th Cir. 2007) ("the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38") (citations omitted); *Alford v. Consol. Gov't of Columbus*, 438 Fed. Appx. 837, 840-41 (11th Cir. 2011) (imposing sanctions under 28 U.S.C. § 1927 for "knowingly and recklessly pursu[ing] frivolous claims on appeal that unreasonably multiplied the proceedings," and remanding to the district court "to determine and assess a reasonable amount of attorneys' fees for the defense of this appeal."); *UFCW Local 880-Retail Food v. Newmont Mining Corp.,* 261 Fed. Appx. 105, 110 (10th Cir. 2008) ("Because this appeal is frivolous and because Gideon's conduct 'manifests intentional or reckless disregard of the attorney's duties to the court,' we GRANT defendants' motion for just damages, double costs, and attorneys' fees") (citations omitted).

Plaintiffs respectfully request that the Court dismiss this appeal and award sanctions against Mr. Casey.

Dated: June 18, 2014

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CERTIFICATION PURSUANT TO NINTH CIRCUIT RULE 27-1 AND CIRCUIT ADVISORY COMMITTEE NOTE 27-1(5)

Pursuant to Ninth Circuit Rule 27-1 and Circuit Advisory Committee Note 27-1(5), counsel for defendant Apple Inc. has advised Co-Lead Plaintiffs' Counsel that Apple supports this motion to dismiss on the basis that appellee Mr. Casey lacks standing. Apple has also advised Co-Lead Plaintiffs' Counsel that Apple may support the request for sanctions if the amount sought is limited to attorneys' fees and costs in connection with the filing this motion to dismiss based on the frivolous nature of the appeal, but will make a final decision after reviewing the motion.

Co-Lead Plaintiffs' Counsel attempted to contact Appellant-Objector Mr. Casey via email on Wednesday, June 18, 2014, at 9:54 a.m. EDT, at the email address (michael@mickeycasey.com) that Mr. Casey instructed counsel to use as the sole means of communicating with him (*see* Objection, Dkt. No. 112, at page 2 ("Please only communicate with me via email")), but to date Mr. Casey has failed to respond.

/s/ *Jeffrey L. Fazio*

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND STYLE REQUIREMENTS OF RULE 32(a)(5) and (6) AND LENGTH REQUIREMENT OF RULE 27(D)2)

This brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6), and its length complies with Fed. R. App. P. 27(d)(2).

__/s/ *Jeffrey L. Fazio*___________

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies as follows:

I am a citizen of the United States, a resident of the State of California, over the age of eighteen years, and not a party to the action. My business address is 2410 Camino Ramon, Suite 315, San Ramon, California, 94583.

On the date set forth below, I used the appellate CM/ECF system to file electronically the foregoing PLAINTIFFS/APPELLEES' MOTION TO DISMISS AND TO IMPOSE SANCTIONS AND INCORPORATED MEMORANDUM OF LAW on behalf of Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. I understand that, with the exception of Michael Casey, all principal participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System.

To ensure that Mr. Casey, who claims to be proceeding *pro se*, receives a copy of this document, I sent a copy to him by Overnight Delivery to the following address: 4957 Black Oak Drive, Madison, Wisconsin 53711. In addition, I sent a copy to him by email to the following email address: michael@mickeycasey.com.

Executed on June 20, 2014, at San Ramon, California.

/s *Jeffrey L. Fazio*
Jeffrey L. Fazio

EXHIBIT NO.	DESCRIPTION	DOCKET NO.

EXHIBITS CITED IN MOTION TO DISMISS APPEAL AND FOR SANCTIONS

1. Stipulation of Settlement and Release of Claims 76.1

2. Order Granting Final Approval of Settlement Agreement; Awarding Attorney Fees, Costs, and Incentive Awards to Class Representatives; and Dismissing Claims of Settlement Class Members with Prejudice 154

3. Declaration of Tim O'Neil in Support of Apple's Response to Objections to Proposed Settlement 139

4. Relevant Portions of Declaration of Anthony Fata in Response to Jeffrey Scott Kessinger's Objections to Class Action Settlement and Attorney's Fees 141-4

5. Order on Joint Discovery Letters [Docket Nos. 120, 121, 123] 126

6. Second Supplemental Declaration of Patrick M. Passarella in Support of Motion for Final Approval of Class Action Settlement 149-1

7. Declaration of Patrick M. Passarella in Support of Motion for Final Approval of Class Action Settlement 99

8. Letter from Michael Casey to Clerk of the United States District Court (dated December 4, 2013) 112

EXHIBIT NO.	DESCRIPTION	DOCKET NO.
9.	Supplemental Declaration of Patrick M. Passarella in Support of Motion for Final Approval of Class Action Settlement	141-1
10.	Letter from Michael Casey to Hon. Magistrate Judge Donna M. Ryu (dated January 13, 2014)	129
11.	Notice of Appeal	N/A
12.	Order Regarding Objectors' Letter	130